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SUPREME COURT, U.S.

In the Supreme Court of the United States

October Term, 1955

Kenneth M. Cox, petitioner,

v.

Philip Young, Chairman, Thomas M. Moore, and Paul[illegible] Members of the United States Civil Service Commission, and Oveta Culp Hobby, Secretary, Department of Health, Education and Welfare.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE [illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 442

KENDRICK M. COLE, PETITIONER

v.

PHILIP YOUNG, Chairman, GEORGE M. MOORE, and FREDERICK J. LAWTON, Members of the United States Civil Service Commission, and OVETA CULP HOBBY, Secretary, Department of Health, Education and Welfare

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals have not been officially reported but are set out in Appendix "C" of the petition. The opinion of the district court (J.A. 45-53),[1] is reported at 125 F. Supp. 284.

[1] References to the Joint Appendix filed in the court of appeals will be indicated by "J.A. —." References to the petition will be indicated by "Pet. —."

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1955 (R. 66). The petition for a writ of certiorari was filed on October 3, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether Executive Order 10450 validly conferred authority upon the Secretary of Health, Education and Welfare to remove, pursuant to the provisions of the Act of August 26, 1950, a Food and Drug Inspector in that Department.

2. Whether Executive Order 10450, after a finding by the President that such action was necessary in the best interests of the national security, could validly implement the Act of August 26, 1950, by directing that each department and agency head establish an effective program to insure that the retention in employment of any civilian officer or employee be clearly consistent with the interests of the national security.

3. Whether a department head's letter to an employee which refers to written charges previously brought against the employee, to the sections of Executive Order 10450 upon which the charges were based, and to the employee's refusal to answer such charges, and states that his employment is being terminated because it has been determined that his continued employment is not clearly consistent with the interests of national security, is a "written statement of the decision" of the department head within the intendment of the Act of August 26, 1950.

STATUTES, EXECUTIVE ORDER AND REGULATIONS INVOLVED

The statutes and Executive Order involved are set forth in pertinent part in Appendix "A" of the petition (Pet. 24-33) and in the Appendix to this brief at pages 22-23. The pertinent portions of the regulations of the Department of Health, Education and Welfare are set forth in the Appendix to this brief at pages 24-25.

STATEMENT

Petitioner, who has veteran's status under the Veterans' Preference Act of 1944 (58 Stat. 387, 5 U.S.C. 851 *et seq.*), held a position in the classified civil service as a Food and Drug Inspector in the New York District of the Food and Drug Administration in the Department of Health, Education and Welfare. In that position he did not have access to government secrets or classified material and was not in a position to influence policy against the interests of the Government (J.A. 3, 37, 40). In October, 1953, petitioner was interviewed by the Chief of Personnel Security of the Department of Health, Education and Welfare in connection with an investigation regarding his retention in employment under the Government employees security program, a program established by Executive Order 10450 (18 F.R. 2489) pursuant to the authority granted in the statutes cited therein. During this interview petitioner was questioned concerning his attitudes, associations and friends (J.A. 3, 37).

On November 13, 1953, petitioner received a notice of suspension "pending investigation under

Executive Order 10450" (J.A. 3, 38). The Under Secretary of the Department of Health, Education and Welfare, by letter dated November 25, 1953 (J.A. 16-18), informed petitioner of the reasons for his suspension and set forth the following written statement of charges:

> 1. That you established and have continued a close association with individuals reliably reported to be Communists.
> 2. That you have maintained a continued and sympathetic association with the Nature Friends of America, which organization has been cited by the Attorney General under the provisions of Executive Order 10450.
> 3. That you have, by your own admission, donated funds to the Nature Friends of America.
> 4. That you have contributed your services in the form of work to the Nature Friends of America.
> 5. That you have attended social gatherings of the Nature Friends of America. [J.A. 16, 17.]

The letter further informed petitioner that he might submit within thirty days statements or affidavits refuting or explaining the charges and that he was entitled to a hearing if he requested one.

On December 23, 1953, petitioner replied to the letter of the Under Secretary, refusing "to make

any explanation regarding the associations carried on in my private life" on the following grounds:

> * * * I consider any request by the United States Government for me to make an explanation regarding my personal choice of friends and social activities as an invasion of my private rights and of my basic inherent right of "freedom of association." [J.A. 19.]

Petitioner was thereupon informed by the Department, by letter of January 4, 1954, that since it appeared from his letter that he did not desire a hearing, his case had been forwarded to the Secretary for final disposition and he would be advised of the determination made (J.A. 20).

On January 15, 1954, the Secretary, after referring to the letter of the Under Secretary, to the statement of charges, to the sections of the Executive Order upon which the charges were based, to petitioner's reply refusing to offer any explanation "regarding the associations carried on in your private life", and to his declared intention to "continue to associate with any persons or groups of persons whom you see fit to choose", advised petitioner that:

> "Based on a study of all the documents in your case, including your reply to reference letter, it has been determined that your continued employment in the Department of Health, Education, and Welfare is not clearly consistent with the interests of national secu-

> rity. Therefore, your termination has been ordered effective at the close of business January 20, 1954. [J.A. 21.]

On January 27, 1954, petitioner's counsel sought to reopen petitioner's case on the ground that petitioner had been in a "post-operational depression," but now believed he could refute the charges against him (J.A. 22, 23). Sworn affidavits were enclosed with the letter (J.A. 24-26). Petitioner's counsel again wrote the Department on January 29, 1954, stating that if a hearing were granted petitioner would disprove the charges (J.A. 27). The Secretary advised petitioner's counsel on February 4, 1954, that the request for reopening was denied (J.A. 28). On February 10, 1954, petitioner's counsel again wrote the Secretary reiterating his previous statements and asserting various procedural and constitutional problems (J.A. 29-31). On February 24, 1954, the Secretary replied, again declining to reopen the case, stating that petitioner's separation was accomplished in accordance with Executive Order 10450, and that the validity and constitutionality of the Executive Order and the constitutionality of the Act of August 26, 1950 were not matters to be determined by that Department (J.A. 32).

Petitioner appealed his discharge to the Second Civil Service Region on February 25, 1954, claiming violations of the Veterans' Preference Act and the Civil Service Commission's regulations thereunder. The Civil Service Regional Director de-

clined to accept this appeal, on the ground that the Veterans' Preference Act is not applicable to determinations made pursuant to the Act of August 26, 1950, and Executive Order 10450. On petitioner's appeal to the Civil Service Commission this ruling was affirmed (J.A. 33-36).

On May 28, 1954, petitioner filed a complaint in the United States District Court for the District of Columbia, praying for a declaratory judgment invalidating his discharge by the Secretary of Health, Education and Welfare; for similar relief declaring the refusal of the Civil Service Commission to hear petitioner's appeal to be null and void and in violation of the Veterans' Preference Act; and for an order restoring him to his position as a Food and Drug Inspector as of the date of his discharge (J.A. 2-13).

After the filing of the answer, petitioner and respondents filed cross-motions for judgment on the pleadings. On October 26, 1954, the district court, holding that the Executive Order validly extended the coverage of the Act of August 26, 1950, to include petitioner, granted respondents' motion for judgment on the pleadings and dismissed the amended complaint (J.A. 53). On appeal the court of appeals affirmed, Edgerton, C. J. dissenting. (Pet. App. "C", pp. 39-49).

ARGUMENT

This case, predicated upon the removal of petitioner from his position in the classified civil service, attacks both the validity of Executive Order

10450 (18 F.R. 2489) in the light of the Act of August 26, 1950 (64 Stat. 476, 5 U.S.C. 22-1 *et seq.*), and the validity of the action taken thereunder in petitioner's case with respect to the sufficiency of the notice of dismissal. The case presents solely questions of the interpretation and application of the Act and of the Executive Order. As petitioner concedes (Pet. 22), his dismissal does not give rise to the constitutional issue involved in *Bailey* v. *Richardson*, 341 U.S. 918, and *Peters* v. *Hobby*, 349 U.S. 331. There is no conflict and no occasion for further review by this Court.[2]

1. Petitioner basically contends that his discharge is void on the ground that the provisions of the Act of August 26, 1950, permitting summary dismissal without the right of appeal to the Civil Service Commission as provided by the Veterans' Preference Act, were invalidly applied to him. His position in this regard appears to be twofold: (a) that Executive Order 10450 was illegal insofar as it attempted to extend the 1950 Act to a person in the position of a Food and Drug Inspector in the Department of Health, Education and Welfare, and (b) that even if he could be subjected to an adjudication under the Act, the Secretary nevertheless could not reasonably find that petitioner's dismissal was justified in the interests of national security. Both contentions have been properly re-

[2] In alleging conflicts (Pet. 18-21), the term is not used in the sense commonly used in petitions for certiorari to indicate contrary decisions in other circuits, but rather to indicate petitioner's belief that the case was incorrectly decided on the basis of principles enunciated by this Court.

jected by the courts below on the basis of the clear language of the statute and its purpose as expressed in the legislative history.

It has long been recognized that sole authority over the tenure and removal of employees in the Executive branch of the Government is, under the Constitution, a matter for Executive discretion, except as Congress may validly impose statutory requirements concerning the removal of "inferior Officers." U.S. Const., Article II, Section 2. *Myers v. United States*, 272 U.S. 52. In 1944 Congress passed the Veterans' Preference Act, 58 Stat. 387 (5 U.S.C. 851 *et seq.*). As thus far interpreted, Section 14 of that Act, requiring that an employee possessing a veterans' preference be permitted to appeal his proposed discharge to the Civil Service Commission, represents a valid limitation upon the Executive power of removal. But in this field, as in dismissal cases generally, judicial inquiry has been restricted to the question of compliance with statutory requirements. At no time have the courts intervened to review the basis for executive action or to substitute their judgment for that of the officials. *Eberlein v. United States*, 257 U.S. 82; *Keim v. United States*, 177 U.S. 290; *Carter v. Forrestal*, 175 F. 2d 364 (C.A. D.C.), certiorari denied, 338 U.S. 832.

In enacting the Act of August 26, 1950, Congress created an exception to all prior limitations by permitting, "notwithstanding the provisions of * * * any other law", the summary dismissal of "any civilian officer or employee" in specified de-

partments and agencies when the department or agency head determines that such termination is "necessary or advisable in the interest of the national security of the United States.* * *." Congress further provided, in Section 3 of the Act of August 26, 1950 (5 U.S.C. 22-3), that this summary dismissal power should apply to such other departments and agencies of the Government "as the President may, from time to time, deem necessary in the best interests of national security." It is significant that the phrase *any* civilian employee is used in the Act without any restriction as to the sensitivity of the position occupied by the incumbent.

It is clear, therefore, that when the President, "deeming such action necessary in the best interests of the national security" (Preamble, Executive Order 10450), ordered that the provisions of the Act "shall apply to all other departments and agencies of the Government," he was acting in accordance with and in a manner contemplated by the plain provisions of the statute. It is further clear that the effect of the Executive Order was to extend the Act's coverage to all "civilian officers and employees" of the Executive branch, including petitioner, and thus to do away with any rights which petitioner might otherwise have had under the Veterans' Preference Act or the Lloyd-LaFollette Act (37 Stat. 555, 5 U.S.C. 652).

The petitioner does not question that the President intended thus broadly to extend the Act, but argues rather that the Act, despite its plain word-

ing, did not authorize him to do so. Resort is had to the legislative history in an attempt to restrict the application of the Act to persons holding "sensitive" or "policy-making" positions, despite the fact that neither of these phrases can be found in the statute. Petitioner thus seeks to read into the statute restrictions on the power granted to the President which are nowhere expressed in the Act itself. As the court below stated:

> * * * The trouble with the argument is that the statute itself is explicit on the point. * * * The statute puts the selection of the agencies to be affected in the hands of the President. It says nothing about sensitiveness or policy-making. The basic provision of the statute (Section 1) applies in terms to "any civilian officer or employee" in the named departments and agencies. When the President, under Section 3, * * * makes the statute applicable to other departments, he makes the "any civilian" provision applicable. [Pet. App. "C", p. 41.]

In view of the clarity of the language and the absence of any hint of the restrictive provisions for which petitioner contends, it would require an overwhelming legislative history to justify the bald rewriting of the statute which petitioner seeks. On the contrary, both Committee Reports make it clear that the President could extend the "coverage of this act to any department or agency when, in his opinion, the national security requires it." Sen. Rep. No. 2158, 81st Cong., 2d Sess., p. 3. See

also H. Rep. No. 2330, 81st Cong., 2d Sess., p. 2. While the Reports speak of "Federal employees who, although loyal, are so careless as to jeopardize the national security" and "poor security risks" (Sen. Rep. No. 2158, *supra*., p. 2), the Committees made no attempt whatsoever to define what they meant by "security risks".

A comparison of the legislative history with the actual words of the statute compels the conclusion that Congress deliberately used the broad language authorizing suspension and termination of the employment of "any civilian officer or employee" when such action was deemed necessary "in the interest of the national security" in order to confer upon the Executive branch unfettered discretion in insuring that the national security would not in any way be jeopardized through the actions of any employee in that branch.

2. Petitioner further appears to contend (See Pet. I(a)) that, even if Executive Order 10450 validly extended the application of the 1950 Act to permit the Secretary to consider the summary dismissal of petitioner under its provisions, the Secretary nevertheless could not reasonably have reached the conclusion that it was necessary or advisable in the interests of national security to terminate the employment of petitioner, a "loyal employee, employed in an Agency which is not primarily concerned with vital matters affecting the national defense or security and who has no access to any government secrets or classified information and who occupies a position where he

cannot influence policy against the interests of the United States * * * " (Pet. 11). The argument would seem to be, in essence, that the Secretary, in determining whether the interests of national security required petitioner's dismissal, totally failed to consider the relationship between petitioner's job and the national security. Petitioner thus in effect attacks the factual basis of his discharge.

His failure to set forth a clear formulation of this attack is undoubtedly due in part to petitioner's awareness of the customary refusal of the courts to inquire into the adequacy of the grounds upon which employees have been dismissed, limiting judicial inquiry in such cases to determining whether the procedural requirements have been followed (*Eberlein* v. *United States, supra*; *Keim* v. *United States, supra*; *Carter* v. *Forrestal, supra*) and in part to the fact that this general principle has been incorporated in the Act itself. The determination by the department or agency head that termination is "necessary or advisable in the interest of the national security" is stated to be "conclusive and final" as well as discretionary. Since Congress made no attempt to define the circumstances which would render it necessary or advisable in the interests of national security that employment be terminated, the delegation of discretionary power necessarily carried with it the discretion to determine the requirements of "national security" and petitioner's relationship thereto. Accordingly, the regulations of the Department of

Health, Education and Welfare issued pursuant to the Act and the Executive Order required that in reaching her determination in a case such as petitioner's the Secretary take into consideration "(1) the seriousness of the derogatory information developed, (2) the possible access, authorized or unauthorized, of the employee to security information or material, and (3) opportunity, by reason of the nature of the position, for committing acts adversely affecting the national security." (Appendix, *infra* pp. 24-25.) It is not lightly to be assumed, as petitioner's argument would require, that the Secretary ignored her own regulations. Indeed, there is no showing at all that the Secretary's discretion has been abused in this case. And it is difficult to conceive of a case which would justify the court's intervention to substitute its own interpretation of the requirements of national security for that of the Secretary, an executive officer and member of the cabinet, particularly where that officer is dealing with the removal of executive personnel.

3. It is asserted, however, that the Secretary was in fact deprived of her statutory discretion by the terms of Executive Order 10450. There is no merit in this contention and it was properly rejected by the court below.

The Act provides that the head of a department or agency "may" summarily terminate employment "whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States * * *." The

Executive Order states that the department or agency head "shall" terminate employment whenever the same determination is made. An objection based upon this difference is wholly without substance. It is inconceivable that the head of a department or agency would determine that an employee's dismissal was "necessary or advisable in the interest of national security" and then fail to exercise the dismissal power conferred by the statute in such circumstances, especially when the sole purpose of making such a determination is to enable the agency head to exercise that power. The real, operative discretion which was given by Congress was not with respect to terminating the employment but with respect to reaching the initial determination, and that discretion is reiterated, not destroyed, in the Executive Order.

In requiring the exercise of the dismissal power whenever the department or agency head reached the determination for which the statute provided, the President was, as the court below recognized, properly acting in his capacity as Chief Executive.[3] There is no indication that Congress, in placing dis-

[3] In this connection the court of appeals held that this and other aspects of Executive Order 10450 did not conflict with the statute; and went on to note that had it reached a contrary conclusion, as did the dissenting judge, it would be forced to decide the grave constitutional issue of whether the President, in the exercise of the "executive power," might not have the authority to order the summary dismissal of any employee in the Executive branch whose retention he or his delegated subordinates deemed not clearly consistent with the national interest. The issue thus raised would be whether Congress could constitutionally deprive him of that power.

vention in the heads of departments or agencies, intended to interfere with the President's normal function of giving broad direction to the actions of his subordinate officers in the Executive branch in dealing with an executive matter. The court below held that congressional recognition of this traditional role of the President was "implicit in the enactment" and "must be conclusively presumed" (Pet. App. "C", p. 43).

The President was similarly exercising his broad powers of direction of the affairs of the Executive branch when he in effect declared that, in carrying out their statutory function of determining whether it is necessary or advisable that an individual's employment be terminated, his subordinate department and agency heads should be guided by the principle that no person should be retained as an employee unless his retention was clearly consistent with the interests of national security. Petitioner's contention that the Executive Order substitutes "a more onerous standard of judgment" (Pet. 19) than that prescribed by the Act was fully answered by the court below:

> But we think the Executive Order is a pronouncement by the President that in his judgment it is advisable in the interest of the national security under present circumstances that no employee be retained unless his retention is clearly consistent with the interests of the national security. That is a rational and reasonable position. It is fully within the terms of the statute * * *. [Pet. App. "C", p. 42.]

The fact that the program established by Executive Order 10450 is aimed at making certain that the retention of all employees is "clearly consistent with the interests of the national security" does not, as petitioner appears to contend, preclude the weighing by the Secretary of the potential effect on national security of petitioner's retention against the seriousness of the adverse information developed in his case. On the contrary, the Executive Order affirmatively requires such a consideration.

The court went on to point out that, in essence, petitioner complains because the Secretary, in the exercise of her admitted authority to act, followed a policy and program laid down by her superior, and argues from this that the Secretary's action is void. "That position is untenable on its face." (Pet. App. "C", p. 44).

It is further clear that the program established by Executive Order 10450 does not, in fact, establish a system which, as petitioner contends, ignores the relative sensitivity of various positions in the Executive branch. Sections 3(a), 3(b), and 8(a) of the Order all contain provisions which emphasize the need to consider "the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security * * *." Section 3(a), Appendix, p. 22, *infra*. These provisions make it manifest that the Executive Order does not ignore the principle that an employee may, on certain security grounds, be unsuitable for employ-

ment in one Government position but not in another.[4]

4. Petitioner's final contention is that his notice of discharge was defective because the Secretary's letter of January 15, 1953 (J.A. 21) "failed to set forth any of the reasons" for her determination (Pet. 20). This contention, as the court below held, is also without merit in the circumstances of this case.

The Act requires that, upon suspension, the employee "shall be notified of the reasons for his suspension," to the extent permitted by security considerations. In accordance with this provision, petitioner was notified of the reasons for his suspension in the letter from the Under Secretary of the Department of Health, Education and Welfare, dated November 25, 1953 (J.A. 16-18), which letter also fulfilled the statutory requirement that the employee be given a "written statement * * * of the charges against him * * *." After opportunity to answer the charges and to request a hearing, the Act provides that the employee "shall be given * * * a written statement of the *decision* of the

[4] These provisions are also clearly authorized by Section 1753 of the Revised Statutes, 5 U.S.C. 631, cited in Executive Order 10450, the provisions of which authorize the President to "prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties * * *."

agency head * * *." It is this last requirement which petitioner contends has not been fulfilled.

It is clear that the Secretary's letter fully apprised petitioner of the basis upon which the determination rested. Specific reference was made to the letter of the Under-Secretary, to the statement of charges, and to the sections of the Executive Order upon which the charges were based. Reference was likewise made to petitioner's reply, to his refusal to offer any explanation "regarding the associations carried on in your private life," and to his statement that he intended to continue "* * * to associate with any persons or groups of persons whom you see fit to choose." The letter then stated that the Secretary's conclusion was "[b]ased on a study of all the documents in your case, including your reply to reference letter * * *."

In the light of petitioner's refusal to request a hearing, it is clear that the Secretary could have given him no more elaborate or detailed statements of the "reasons" for his dismissal than she did. Nothing had been added to the case for or against petitioner since the charges were issued. Petitioner does not complain of the sufficiency of the statement of charges, and it must be presumed that the charges were "stated as specifically as security considerations permit," as the Act required. The Secretary consequently could do no more in furnishing the statement of her decision than to refer again to the statement of charges.

Petitioner likewise complains that the Secretary "never made a determination that petitioner's

dismissal was 'necessary or advisable in the interest of the national security of the United States' * * *" (Pet. 19). This is an insubstantial contention. The letter of the Secretary states that "* * * it has been determined that your continued employment in the Department of Health, Education, and Welfare is not clearly consistent with the interests of national security. Therefore, your termination has been ordered effective at the close of business January 20, 1954" (J.A. 21). But where the President has determined that national security requires that no employee be retained unless his retention is clearly consistent with the interests of national security, the Secretary's determination that petitioner's continued employment was not clearly consistent with the interests of national security, followed by her termination of his employment, clearly constituted a determination that his termination was necessary or advisable in the interests of national security. Her action was thus in conformity with both the Act and the Executive order.

The only question of any general application in this case is that raised by petitioner's contention that Congress did not intend that the Act of August 26, 1950, be extended in the manner accomplished by Executive Order 10450. In view of the virtually unprecedented congressional and, indeed, public awareness not only of the existence but of the detailed provisions of this particular Executive Order, this contention is answered by the fact that Congress, in the two and one-half years of its op-

eration, has made no attempt to alter this Executive action by legislation, even if it constitutionally could do so.[8]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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Solicitor General.
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PAUL A. SWEENEY,
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Attorneys.

NOVEMBER, 1955.

[8] On May 5, 1953, the full texts of both the Act of August 26, 1950 and Executive Order 10450 (promulgated April 27, 1953) were inserted together into the Congressional Record during the course of debate upon certain appropriation act riders which would have given the heads of the Departments of State, Justice and Commerce absolute discretion to fire employees "in the interest of the United States." 99 Cong. Rec. 4511-4543. After extended debate, including discussion of the relationship between the Executive Order and the Act, the riders were defeated, it being the sense of the House that Executive Order 10450, properly promulgated under the Act of August 26, 1950, adequately covered the field and provided necessary protection for employees through the provision for hearings. 99 Cong. Rec. 4543.

[9] See note 3, *supra*, p. 15.

Executive Order 10450, 18 F.R. 2489, as amended:

* * * * *

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation: *Provided*, that upon request of the head of the department or agency concerned, the Civil Service Commission may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there

shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided*, that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the other provisions of this order: *And provided further*, that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field preappointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

* * * * *

Section 5 of the Regulations relating to the security program of the Department of Health, Education, and Welfare, promulgated September 24, 1953, provides in pertinent part:

Section 5. *Suspension and Termination*

(a) With respect to any employee on whom sufficient derogatory information exists to indicate the need to recommend suspension to the Secretary, the Director of Security shall, before submitting his recommendation, make available to the head of the appropriate constituent organization, and to the Office of the General Counsel, pertinent facts for comment. Their comments will be incorporated in the report of the Director of Security which shall be submitted to the Secretary with his recommendation.

(b) Thereafter, if the Secretary deems suspension necessary in the interest of national security, the Personnel Officer shall be directed to suspend the employee immediately. If she does not deem such suspension necessary, a written determination to that effect shall be made a part of the investigative file of the person concerned.

(c) Factors to be taken into consideration in making the determination required by subsection (b) of this section shall include, but shall not be limited to, (1) the seriousness of the derogatory information developed, (2) the possible access, authorized or unauthorized, of

the employee to security information or material, and (3) opportunity, by reason of the nature of the position, for committing acts adversely affecting the national security. Pending final determination in cases in which ameliorating circumstances are present, the employee may, with the approval of the Directors of Security and Personnel, be transferred temporarily to a position in which the interests of the national security cannot be adversely affected by the employee.

* * * * *

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